

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Liberty Communications, Inc.)	WT Docket No. 02-55
and Sprint Nextel Corporation)	
)	
Mediation No. TAM-50034)	

MEMORANDUM OPINION AND ORDER

Adopted: July 15, 2010**Released: July 16, 2010**

By the Deputy Chief, Policy Division, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order* we address a matter referred to us for *de novo* review from Wave 3, Phase 2 mediation by the 800 MHz Transition Administrator (TA) involving a dispute between Liberty Communications, Inc. (Liberty), operator of a Specialized Mobile Radio (SMR) system in the Florida Panhandle, and Sprint Nextel Corporation (Sprint) (collectively, the Parties).¹ The issues disputed in this case are: alleged post-reconfiguration interference on some of Liberty's replacement frequencies, Liberty's continued operation on its pre-rebanding frequencies, and certain legal and consultant fees associated with investigating the alleged interference.

2. Based on our review of the mediation record, the Recommended Resolution submitted by the TA-appointed mediator in this case, and the Parties' position statements, we find that: (a) Liberty is mistaken in its assumption that it is entitled to protection against adjacent channel interference; (b) Liberty is incorrect in claiming that it was assigned a less than comparable replacement channel at its Central Tower and East Point sites;² (c) certain of Liberty's claimed costs do not meet the Commission's "minimum cost" standard;³ (d) Sprint should pay Liberty \$60,320 in connection with the investigation of alleged interference to Liberty's system; and (e) Liberty must discontinue operation on its pre-rebanding frequencies forthwith.

II. BACKGROUND

3. The *800 MHz Report and Order* and subsequent orders in this docket require Sprint to negotiate a Frequency Reconfiguration Agreement (FRA) with each 800 MHz licensee that is subject to rebanding.⁴ The FRA must provide for retuning of the licensee's system to its new channel assignments

¹ Recommended Resolution, TAM-50034 (Jan. 21, 2009) (TA RR) at 1.

² Nonetheless, and at Liberty's option, we authorize the TA to assign a different replacement channel at one of the two sites, provided, however, that Liberty must bear the associated expense.

³ See Improving Public Safety Communications in the 800 MHz Band, *Memorandum Opinion and Order*, 22 FCC Rcd 9818, 9821 (2007) (*Rebanding Cost Clarification Order*).

⁴ See Improving Public Safety Communications in the 800 MHz Band, *Report and Order*, *Fifth Report and Order*, *Fourth Memorandum Opinion and Order*, and *Order*, 19 FCC Rcd 14969, 15021-45, 15069 ¶¶ 88-141, 189 (2004) (*800 MHz Report and Order*); Improving Public Safety Communications in the 800 MHz Band, *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd 25120 (2004) (*800 MHz Supplemental Order*); Improving Public Safety Communications in the 800 MHz Band, *Memorandum Opinion and Order*, 20 FCC Rcd 16015 (2005).

at Sprint's expense, including the expense of retuning or replacing the licensee's radio units as required.⁵ Sprint must provide the rebanding licensee with "comparable facilities" on the new channel(s), and must provide for a seamless transition to enable licensee operations to continue without interruption during the retuning process.⁶ If the parties cannot reach agreement on a FRA, the case is referred to mediation, and issues that cannot be resolved in mediation are, in turn, referred to the Public Safety and Homeland Security Bureau (PSHSB) for *de novo* review.⁷ The Parties have been unable to resolve their disputes relating to the above-described issues, requiring that we resolve those issues *de novo*.

4. Liberty operates a ten-site 800 MHz radio system with a total of 50 licensed frequencies in Northern Florida.⁸ On September 26, 2006, Liberty, Sprint, Southern Communications Services, Inc., and Nextel Partners Operating Corporation⁹ entered into an FRA and Liberty commenced rebanding activities.¹⁰ Liberty transitioned to its post-reconfiguration frequencies in late December 2007.¹¹ On January 23, 2008, Liberty submitted a Change Notice, alleging that interference was occurring at two of its sites – the Ridgeland Road (Central Tower) site in Tallahassee, Florida, and the East Point site (East Point), near Apalachicola, Florida.¹² Liberty claims that replacement frequency 857.0875 MHz used at both the Central Tower and East Point sites (102.49 km apart) does not comply with the short-spacing criteria in Section 90.621(b)(4) of the Commission's rules.¹³ The Change Notice proposes certain actions Sprint must take to address the alleged interference and to provide Liberty with what it regards are comparable facilities.¹⁴ The Change Notice also requests that Sprint pay all outstanding amounts due under the FRA, and provide advanced funding for the additional rebanding work necessary to resolve the alleged interference.¹⁵

⁵ 800 MHz Report and Order, 19 FCC Rcd at 14977 ¶ 11.

⁶ *Id.* at 14986 ¶ 26.

⁷ *Id.* at 15077 ¶ 201.

⁸ TA RR at 3.

⁹ Southern Communications Services, Inc, d/b/a SouthernLINC Wireless, and Nextel Partners Operating Corporation, a wholly owned indirect subsidiary of Sprint Nextel Corporation, offer ESMR service in some Southeastern markets. See 800 MHz Report and Order, 19 FCC Rcd at 14985, n.59.

¹⁰ On December 21, 2005, the TA assigned Liberty replacement frequencies for nine of its call signs, and on February 28, 2006 assigned replacement frequencies for the remaining two call signs. Nextel Communications, Inc. Reply to Liberty Communications, Inc. Proposed Resolution Memorandum at 5, n.15 (Dec. 9, 2008) (Sprint Reply).

¹¹ Liberty Communications, Inc. Proposed Resolution Memorandum TAM 50034 (Dec. 3, 2008) (Liberty PRM), at 2.

¹² *Id.* at Ex. 1. The Central Tower site is licensed under call sign KNIQ708. The East Point site is licensed under call signs WPIT419 and WPLS383. Liberty alleges it is experiencing interference on frequencies licensed under call sign WPLS383. TA RR at 3.

¹³ 47 C.F.R. § 90.621(b)(4).

¹⁴ Liberty PRM at 2. The Change Notice requests that Sprint:

(a) release to Liberty all remaining unpaid amounts under the existing FRA, as most recently amended, including any reallocation of existing budgeted amounts necessary to make these funds available; (b) commence negotiation with Liberty of an amendment to FRA Schedule C that will include a statement of additional work to be completed to provide Liberty with comparable facilities, which may include a third party interference study and evaluation of the suitability of the frequencies Liberty received in the original Schedule B to the FRA, and any substitute frequencies that may be required; and (c) provide additional up-front funding for this additional work. *Id.* at Ex. 1.

¹⁵ *Id.* Ex. 1 at 2.

5. On July 8, 2008, Liberty and Sprint executed a Statement of Work (SOW) for an independent third-party engineering consultant, Bird Technologies Group (Bird), to investigate the alleged interference and prepare a report recommending interference mitigation measures (the Bird Report). Sprint agreed to pay Bird's fee for preparing the report.¹⁶ Sprint's agreement to pay, however, was limited to Bird's fee and did not include any ancillary activities by Liberty or its contractors.

6. In the FRA, as amended, the Parties agreed that the estimated total cost of Liberty's reconfiguration was \$650,135.35.¹⁷ Liberty, however, then sought an additional \$410,307.31 in reconfiguration costs:¹⁸ (a) \$42,930 for interference analysis and studies conducted by National Wireless Technologies, Inc. (National Wireless); (b) \$98,163.43 in internal costs (including \$4,000 to manage the Bird investigation); (c) \$132,948.88 for legal services rendered by Latham and Watkins, LLP (Latham); (d) \$100,840 for legal services from Schwaninger and Associates (Schwaninger);¹⁹ (e) \$34,225 for Bird Technologies Group; and (f) \$1,200 for the services of Adgen Telecom Group (ATG) to prepare contour studies.²⁰ Sprint has offered to pay \$47,800 of additional reconfiguration costs, leaving \$362,507.31 in dispute for legal, internal and consultant fees that are not covered by the FRA or the approved Change Notice, *i.e.*, the Change Notice authorizing the Bird study.²¹

7. On January 21, 2009, after mediation proved unsuccessful, the mediator referred the matter to PSHSB for *de novo* review and resolution, submitting the record and a Recommended Resolution.²² On February 4, 2009, both parties filed Statements of Position with the Bureau in accordance with our *de novo* review procedures.²³

A. Parties' Positions

8. *Liberty Position.* Liberty argues that its replacement frequencies, which it began using in December 2007, do not provide it with comparable facilities.²⁴ It asserts that during negotiations it requested sufficient spacing between its replacement frequencies to permit interference-free operation and "strenuously argued [against] the reuse of frequency channel, 857.0875 MHz at the Central Tower site [because it] would be short-spaced to the East Point location, in violation of the Federal Communications Commission (FCC) spacing rules, and would result in harmful interference between the two sites."²⁵ Liberty claims the Bird Report supports the existence of interference because it concludes that "transmissions from the Central Tower location actually transmit into the East Point service area in sufficient amplitude to disrupt [co-channel East Point] communications."²⁶ In addition, Liberty requests that Sprint immediately pay the outstanding balance due under the FRA, as amended, and the additional

¹⁶ The Parties agree that Bird's fee for the interference investigation report is \$34,225.

¹⁷ TA RR at 25.

¹⁸ *Id.*; Nextel Communications, Inc. Supplemental Proposed Resolution Memorandum, App. H (Jan. 8, 2009) (Sprint Supplemental PRM) at 49.

¹⁹ Liberty Supplement PRM at 13-14.

²⁰ *Id.*

²¹ See Sprint Supplemental PRM, App. H. at 49.

²² The Parties initially disputed when Liberty must return loaned equipment to Sprint. Liberty PRM at 19; Sprint PRM at 21. In reply briefs, the Parties agree that "Liberty is obligated to return the loaned equipment 30 days after the Closing Date" under the terms of the FRA. Sprint Reply at 26. We therefore do not address this issue.

²³ Liberty Communications, Inc. Statement of Position (Liberty SOP) (Feb. 4, 2009); Nextel Communications, Inc. Statement of Position (Sprint SOP) (Feb. 4, 2009).

²⁴ Liberty PRM at 2.

²⁵ *Id.* at 4, 6.

²⁶ *Id.* at 5 citing Bird Report at 12-13.

technical and legal fees Liberty incurred to investigate and document the alleged interference.²⁷ Liberty also urges that negotiations should be initiated to amend Schedule C of the FRA to include a statement of additional work necessary to provide Liberty with comparable facilities, which work may include an additional independent interference study and an evaluation of the frequencies received in the original FRA Schedule B, and any substitute frequencies that may be needed.²⁸ Liberty also asserts it is entitled to advance funding for the corrective work needed to provide it with comparable facilities.²⁹

9. *Sprint Position.* Sprint contends it has “fulfilled its obligation to provide Liberty with comparable facilities, and is not obligated to provide any more financial or logistical assistance to resolve alleged interference complaints.”³⁰ Sprint asserts that “any problems Liberty is experiencing predates (sic) reconfiguration and cannot be attributed to reconfiguration.”³¹ Sprint also claims that it worked with Liberty, in good faith, to investigate the alleged interference and analyze the Bird Report.³² Sprint’s assessment of the Bird Report is that Bird neither identified a source of interference nor linked the alleged interference to rebanding of Liberty’s system.³³ Sprint argues that the Bird Report details several operational and maintenance issues that could cause the interference Liberty claims to have experienced.³⁴ Sprint contends it is not responsible for either providing new replacement frequencies to Liberty or paying the cost of retuning Liberty’s equipment to new frequencies.³⁵

10. Finally, Sprint argues that Liberty is pursuing an unnecessary change in frequencies and has incurred additional costs without the consent of Sprint or the TA, thereby misinterpreting the FRA and ignoring its obligations under the FRA and the Change Notice process.³⁶ Sprint also maintains that “Liberty’s refusal to release its original frequencies is holding up the reconciliation and closing of the FRA, [and] is also blocking a Stage 2 public safety licensee from moving onto those frequencies.”³⁷

11. *TA Mediator Recommendation.* The mediator recommends we find that Sprint has met its burden of proof, *i.e.*, that it has shown that it has provided Liberty with comparable facilities. With respect to the assignment of frequency 857.0875 MHz at both the Central Tower and East Point sites, the mediator gives considerable weight to the fact that, pre-rebanding, Liberty was operating station WPLS383 in excess of its licensed parameters, and that Liberty improperly analyzed its expected interference protection based on its secondary site license parameters.³⁸ Based on those findings, the mediator found it unnecessary to evaluate the Bird Report and concluded that the assignment of frequency 857.0875 MHz to both the Central Tower and East Point sites did not violate the short spacing rules.³⁹

²⁷ *Id.* at 9-10.

²⁸ *Id.*, Ex. 1 at 2.

²⁹ Liberty PRM at 2.

³⁰ Sprint PRM at 8.

³¹ Sprint Reply at 2.

³² Sprint PRM at 9.

³³ *Id.* at 10.

³⁴ *Id.*

³⁵ *Id.* at 9.

³⁶ *Id.* at 19; Sprint Reply at 27.

³⁷ Sprint PRM at 17, n.46.

³⁸ TA RR at 21.

³⁹ *Id.* at 21.

The mediator also recommended that Liberty be deemed responsible for any costs associated with relocating to a new frequency should the TA find an alternative frequency is available for Liberty.⁴⁰

12. The mediator also recommends that the we find that Liberty was provided with comparable facilities when the TA assigned adjacent channels within Liberty's system.⁴¹ The mediator concludes that Liberty is entitled only to the interference protection it had prior to rebanding, and notes that the Bird Report does not specifically identify any interference attributable to the adjacent channel assignments.⁴² The mediator also notes that the TA engineer concurs that the Bird Report did not identify actual interference.⁴³ The mediator finds no record support for Liberty's allegation that it objected to the adjacent channel assignments during the FRA negotiations.⁴⁴ Finally, with respect to the disputed legal and technical expenses, the mediator determines that Liberty "has not satisfied the 'minimum necessary cost' standard for most of the requested costs," and concludes that Sprint is not liable for most of them.⁴⁵ The mediator recommends that Sprint should pay: (a) \$3,975 for the additional work performed by National Wireless, Inc.; (b) up to \$5,600 of Schwaninger legal fees; and (c) up to \$1,200 for ATG's services, all subject to the submission of adequate documentation.⁴⁶

III. DISCUSSION

A. Standard of Review

13. In accordance with the *800 MHz Rebanding Orders*, Liberty must be provided with replacement frequencies that are comparable to its pre-rebanding frequencies.⁴⁷ As provided in Section 21 of the FRA, Sprint must pay for whatever additional or replacement equipment may be necessary to render a replacement frequency comparable to a pre-rebanding frequency. Additionally, Sprint must pay for the equipment or services necessary to ensure that the transition to replacement frequencies is seamless and does not result in interruption of service.⁴⁸ Liberty is entitled to the same level of interference protection on its replacement frequencies as it had on its pre-rebanding frequencies.⁴⁹

14. Liberty has the burden of proving that the reconfiguration costs it has incurred are reasonable, prudent, and "the minimum necessary to provide facilities comparable to those presently in use."⁵⁰ The Commission clarified the "minimum necessary cost" standard for rebanding in the *Rebanding*

⁴⁰ *Id.* at 22.

⁴¹ *Id.* at 23.

⁴² *Id.* at 22.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 26-27.

⁴⁶ *Id.* at 27.

⁴⁷ The standards for comparable facilities are: (1) equivalent channel capacity; (2) equivalent signaling capability, baud rate and access time; (3) coextensive geographic coverage; and (4) comparable operating costs. *800 MHz Report & Order*, 19 FCC Rcd at 15077 ¶ 201. *See also* Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *Second Report and Order*, 12 FCC Rcd 19079, 19112-19113 ¶ 89-95 (1997).

⁴⁸ *800 MHz Report & Order*, 19 FCC Rcd at 15077 ¶ 201.

⁴⁹ The Commission's rules do not, however, require Sprint to provide Liberty with an identical channel configuration. *See infra* n.87. Moreover, licensees are not entitled to more interference protection than the Commission's rules afford, *e.g.*, a licensee that had no co-channel stations on its original frequencies cannot be heard to complain that there is a co-channel station on its replacement frequencies so long as that co-channel station satisfies the Commission's co-channel separation requirements.

⁵⁰ *800 MHz Report and Order*, 19 FCC Rcd at 15074 ¶ 198.

*Cost Clarification Order.*⁵¹ There, the Commission stated that “minimum necessary” cost does not mean the absolute lowest cost under all circumstances, but the “minimum cost necessary to accomplish rebanding in a reasonable, prudent, and timely manner.”⁵² This standard considers not only cost, but all of the objectives of the rebanding proceeding including timely and efficient completion of the rebanding process, minimizing the burden that rebanding imposes on public safety licensees, and facilitating a seamless transition that preserves public safety’s ability to operate during the transition.⁵³

B. Issues in Dispute

1. Co-channel Issue

15. Section 90.621⁵⁴ of the Commission’s rules specifies that SMR co-channel facilities must be located at least 113 kilometers (km) apart unless, for shorter distances, they satisfy specific effective radiated power (ERP) and antenna height limits listed in the “Short Spacing Separation Table” in Section 90.621(b)(4)(ii)(C) of the Rules.⁵⁵ The Parties acknowledge that Liberty’s Central Tower and East Point sites are only 102.49 km apart and, therefore, that the Short Spacing Separation Table applies. They differ, however, on which party was responsible for identifying and rectifying the discrepancy between the actual antenna height of Liberty’s East Point antenna and the antenna height authorized on Liberty’s license. The TA, in concluding that the same frequency could be used at both sites, relied on the authorized height as listed on the station license.⁵⁶ Both the WPLS383 application and license list the height to the transmitting antenna tip as 18 meters above ground level (AGL),⁵⁷ whereas Liberty has been operating with the tip of its transmitting antenna at 118 meters AGL.⁵⁸ When the authorized 18 meter AGL figure is applied to the Short Spacing Separation Table, the 102.49 km spacing between the sites meets the Commission’s rules.⁵⁹ Applying the 118 meter AGL value, however, results in the two sites being impermissibly close. The Parties agree that Liberty erred in specifying the 18 meter AGL height in its application; they differ on whether Liberty or Sprint is responsible for the cost of rectifying the error.

⁵¹ *Rebanding Cost Clarification Order*, 22 FCC Rcd at 9821 ¶ 6.

⁵² *Id.*

⁵³ *Id.* ¶ 8.

⁵⁴ 47 C.F.R. § 90.621.

⁵⁵ 47 C.F.R. § 90.621(b)(4)(ii)(C) (Table).

⁵⁶ TA RR at 6, 8-9.

⁵⁷ See Radio Station Authorization, Call Sign WPLS383, “Ant. Ht./Tp meters.”

⁵⁸ Liberty Communications Inc. Response to Nextel’s Proposed Resolution Memorandum at 11, n.31 (Dec. 3, 2008) (Liberty Response).

⁵⁹ In order to apply the Short Spacing Separation Table it is necessary to know “the DHAAT [Directional Height Above Average Terrain] in each direction between every existing co-channel station with (sic) 113 km (70 mi) and the proposed station.” 47 C.F.R. § 90.621(b)(4)(ii)(A). The DHAAT information must be calculated; it is not listed on the station license. In calculating DHAAT, one must first determine the average terrain from 3 to 16 km on a radial between the two co-channel stations and on the radials +/- 15 degrees of the principal radial. See 47 C.F.R. § 90.621(b)(4)(i). The DHAAT is then determined by adding the average terrain value, thus obtained, to the sum of the site elevation and the height of the antenna radiation center above ground level. In the 800 MHz band, the height of the antenna tip is a satisfactory proxy for the antenna center of radiation above ground level because of the short wavelength of the signal. At 857 MHz, for example, the signal wavelength is approximately 35 centimeters. Thus, even for a “high gain” antenna made up of ten elements spaced one-half wavelength apart, the distance between the antenna tip and the antenna’s center of radiation would be only 1.75 meters. The minor difference between the height to the antenna tip AGL and the height of the radiation center AGL is *de minimis* in the 800 MHz band in the context of the Short Spacing Separation Table which has relatively “coarse” listings of DHAAT.

16. *Decision.* We are not persuaded by Liberty's arguments that the TA should not have used the 18 meter value listed in the station license because the 18 meter figure was attributable to an "error in the Commission's data base."⁶⁰ We likewise are not persuaded by Liberty's contention that, because the co-channel "short-spacing" did not exist prior to rebanding, the comparability standard demands that Sprint pay the cost of identifying and implementing a new interference-free channel. Liberty was operating, pre-rebanding, with an antenna height significantly greater than authorized by its license. Nothing in the Commission's 800 MHz orders entitles a licensee to "comparably unauthorized" facilities post-reconfiguration.

17. We agree with Sprint that a licensee bears responsibility for the accuracy of the data on its application and license, and that the 18 meter AGL figure – contained in the WPLS383 license application, and in the station license – appropriately was used when calculating the DHAAT and applying it to the Short Spacing Separation Table.⁶¹ Sprint points out that there is no overlap of the two facilities' service and interference contours when the 18 meter AGL figure is used in the computation.⁶² It argues that the Bird Report does not definitively prove that the co-channel assignment is responsible for Liberty's alleged interference problems,⁶³ and notes that interference, if it exists, could be attributable to maintenance deficiencies that Bird's engineers identified at the East Point tower site.⁶⁴

18. We agree with the TA mediator that the comparable facilities standard does not require Sprint to compensate Liberty for identifying and implementing a new replacement channel. As Sprint notes, the erroneous 18 meter antenna tip AGL information existed on the WPLS383 authorization when it was granted initially, and the licensee did not correct the erroneous information when it filed for renewal of license in 2000.⁶⁵ When Liberty filed its application with the Commission to implement the replacement frequencies in 2006, it again failed to correct the error.

19. The Commission, at the inception of the 800 MHz proceeding, cautioned licensees to review their license information to ensure it was accurate and to make any corrections as soon as possible.⁶⁶ Thus, Liberty was on notice that it had to verify the accuracy of the information on its licenses prior to rebanding, and, not having done so, is responsible for the error in the license and the resultant costs.⁶⁷

20. We reject Liberty's attempt to place responsibility on others to identify and correct the error on Liberty's license. It was Liberty that filed the WPLS383 and WPIT419 renewal and modification applications and had ample opportunity to "cross-check" the application information for the two stations. It was Liberty, as licensee, that had the duty to recognize and remedy the mistake.⁶⁸ It failed to do so. We

⁶⁰ Liberty Supplement PRM at 10. Liberty suggests that the error somehow could have been made by Commission staff. *Id.* We take notice, however, that the Commission's Universal Licensing System (ULS) requires the applicant for a license to enter height parameters directly into the data base, without staff assistance or intervention. We therefore reject Liberty's undocumented implication that the error in its license is attributable to Commission staff.

⁶¹ Sprint Supplement PRM at 5-7.

⁶² Sprint PRM at 13, n.32; Sprint Reply at 14, n.50.

⁶³ Sprint PRM at 9-10.

⁶⁴ Nextel Communications, Inc. Sur Reply to the Liberty Communications, Inc. Response to Nextel's Proposed Resolution Memorandum at 4-5 (dated Dec. 15, 2008) (Sprint Sur-Reply); *see also* Bird Report at 14-16 ("[t]he East Point system should be cleaned up and optimized").

⁶⁵ Sprint Supplement PRM at 5-8.

⁶⁶ 800 MHz Report and Order, 19 FCC Rcd at 14969 ¶ 204.

⁶⁷ TA RR at 21.

⁶⁸ *See* Improving Public Safety Communications in the 800 MHz Band, *Memorandum Opinion and Order*, 20 FCC Rcd 16015, 16057 (2005). ("[L]icensees are strongly cautioned to carefully verify the accuracy of their current

thus find that the TA was justified in taking Liberty's WPLS383 license at face value and that Liberty, which failed to recognize its own mistake for over five years, cannot be heard to shift the cost responsibility for that mistake to either Sprint or the TA. Finally, Liberty's undocumented claim that it vigorously objected to the use of a co-channel frequency at the Central Tower and East Point sites is belied by the fact that Liberty entered into an FRA which specified that the same channel would be used at the two sites.

21. Liberty, although conceding that it is operating with greater than authorized facilities, *i.e.*, with an antenna tip height of 118 meters instead of the authorized 18 meters, has done nothing to bring its operations into conformity with the Commission's rules. Liberty has essentially three options to conform its operations to the Rules: (a) file an application for modification of license to correct the antenna tip height to 118 meters, accompanied by the showings required in Section 90.612(b)(5) of the Rules;⁶⁹ (b) file an application for modification of license to operate with an antenna tip height of 18 meters;⁷⁰ or (c) file an application for modification of license to correct the antenna tip height and change to a frequency that is not "short-spaced" to a co-channel facility.

22. Because Liberty, in its pleadings, has requested assignment of a new fully-spaced frequency at the Central Tower site,⁷¹ we presume it would prefer to exercise option "(c)" *supra*. We are informed by the TA that it is possible, at this time, to identify a suitable fully-spaced frequency for the Central Tower site. Therefore, Liberty may contact the TA to obtain a new frequency and, if such a fully-spaced frequency remains available, to timely file an application for modification of license to implement option "(c)." If a fully-spaced frequency is not available, however, Liberty must exercise either option "(a)" or "(b)." In any event, Liberty's operation at variance with its license may not continue: it must exercise one of the options *supra* within 15 days of the release date of this *Memorandum Opinion and Order*.⁷² Finally, whichever option Liberty elects, the associated cost – which stems from Liberty's failure to verify its licensed parameters – is Liberty's responsibility, not Sprint's.

2. Adjacent Channel Issue.

23. Liberty complains of potential interference to repeater receivers at its Central Tower site stemming from the well-known "near-far" circumstance, *i.e.*, a mobile unit near the repeater presents a strong "undesired" signal to the repeater antenna on "Frequency 1." Simultaneously, a "desired" mobile unit far from the repeater, operating on adjacent "Frequency 2" presents a weak signal to the repeater antenna.⁷³ The repeater receiver is insufficiently selective to reject the "undesired" Frequency 1 signal and, as a consequence, the strong undesired "near" signal on Frequency 1 interferes with the weaker

authorizations and file any corrective applications prior to the time the band is "frozen" in their NPSPAC regions or after the freeze is lifted.") Cf. Visiplex, Inc., *Notice of Apparent Liability for Forfeiture and Order*, 24 FCC Rcd 1 (2009); Corr Wireless Communications LLC, *Notice of Apparent Liability for Forfeiture and Order*, 24 FCC Rcd 5419 (2009). (Licensee responsible for operating within the terms of its authorization and the Commission's rules.)

⁶⁹ Modifying the Liberty license to correct the erroneous information would result in Liberty's Central Tower site being impermissibly short spaced to its East Point site. See 47 C.F.R. § 90.621(b)(4)(ii)(C). Because, however, Liberty is the licensee of both stations, it may invoke 47 C.F.R. § 90.621(b)(5) which allows "short spacing" at distances less than shown in the Short-Spacing Separation Table provided that the licensee of the short-spaced station(s) consents.

⁷⁰ Such an application for modification of license would require that Liberty adjust its HAAT to reflect the change in antenna height.

⁷¹ Liberty SOP at 6, 10.

⁷² If Liberty, despite due diligence, is unable to meet the 15 day deadline, it may file for Special Temporary Authority to operate at its present parameters for an appropriately limited term. See 47 C.F.R. § 1.931.

⁷³ Bird Report at 5.

desired “far” signal on Frequency 2.⁷⁴ In general, the closer the near and far signals are in frequency, the greater the likelihood that the far signal will encounter interference. In the instant case, Liberty complains that interference will occur if Frequency 1 and Frequency 2, in the above example, are separated by less than 100 kHz.⁷⁵

24. At Liberty’s Central Tower site, several frequency pairs are less than 100 kHz apart. Specifically, in the reconfigured system, there are three pairs of channels that are separated by 25 kHz, two pairs of channels that are separated by 50 kHz and one pair of channels that is separated by 75 kHz.⁷⁶ Prior to reconfiguration, only one pair of Liberty’s channels was separated by less than 100 kHz.⁷⁷ Liberty claims, therefore, that the TA’s channel assignment places it in a less favorable interference environment than before reconfiguration.⁷⁸ Liberty asserts that the post-reconfiguration channel spacing is incompatible with Liberty’s equipment configuration, *i.e.*, the combiners, multi-couplers, repeaters, etc. used at the Central Tower site. Liberty claims that this channel-spacing issue concerned it greatly and that it requested different replacement channels several times during FRA negotiations.⁷⁹ Liberty also claims that the Bird Report is an independent study that provides measured evidence of actual interference.⁸⁰

25. *Decision.* Liberty is claiming that it is entitled to protection against interference from rule-compliant signals originating on nearby frequencies, whereas the Commission’s rules afford no such protection against interference – SMR licensees are protected only against co-channel interference. Thus, we agree with Sprint that the replacement frequencies assigned to Liberty at the Central site provide the licensee with comparable facilities because they “are in compliance with the Commission’s Rules and the same interference protection has been provided on all of the replacement frequencies as Liberty enjoyed prior to rebanding.”⁸¹ We also concur with Sprint that adjacent channel assignments are “not only prevalent in most 800 MHz band applications, they are not a recognized form of interference under the Commission’s rules.”⁸² In the *800 MHz Memorandum Opinion & Order*, the Commission clearly noted that the TA was not required to consider adjacent channel stations when assigning a replacement frequency.⁸³

26. Sprint characterizes the Bird Report’s interference discussion as a simulation of potential interference and dismisses the 100 kHz minimum spacing “requirement” as an unsupported opinion.⁸⁴ Again, we agree – the Bird Report contains no instance of actual adjacent channel interference. Finally, Sprint argues, even if Liberty’s channels were spaced as it requests, there is no Commission requirement

⁷⁴ The difference in signal levels can be substantial because the strength of a signal varies as the square of the distance between the transmitter and receiver. Thus, a signal from a mobile unit operating a tenth of a mile from a repeater receiver can be 10,000 times as strong as the signal from a mobile unit operating ten miles from the repeater receiver.

⁷⁵ Liberty PRM at 6-7, n.9.

⁷⁶ Sprint PRM at App. B, Bird Report at 5, 7.

⁷⁷ Liberty Response at 18.

⁷⁸ *Id.* at 19.

⁷⁹ Liberty PRM at 6.

⁸⁰ *Id.* at 7.

⁸¹ Sprint PRM at 10.

⁸² Sprint Reply at 8.

⁸³ See *Memorandum Opinion and Order*, 20 FCC Rcd 16015, 16033 n.85 (2005) (“[a]s with the rules for applications for new licenses, the TA need not consider adjacent channel stations when specifying a replacement channel.”). See also 47 C.F.R. § 90.621(b).

⁸⁴ Sprint Reply at 10-11.

that the channels be protected, *i.e.*, Liberty's facility then would still be subject to adjacent channel interference from mobiles operating on rule-compliant neighboring facilities.⁸⁵ Sprint's observation is correct. Every channel in Liberty's system – pre-rebanding and post-rebanding – was or is susceptible to interference from nearby mobiles and portables in the “near-far” context. Indeed, the record reflects that Liberty complained of adjacent channel interference from Sprint on Liberty's pre-rebanding channels.⁸⁶ Thus, even if Liberty is correct in its assertion that it operated with only occasional interference on its pre-rebanding channels, that was a fortuity – not an entitlement.

27. In sum, the Commission's rules did not provide Liberty with protection against adjacent channel interference before its system was reconfigured and the rules remain the same post-reconfiguration – SMR licensees are not protected against adjacent channel interference from portable or mobile units regardless of the system with which those units are associated. Requiring Sprint to pay for providing Liberty with a more interference resistant system post-reconfiguration would be an undeserved “upgrade,” *i.e.*, it would not be consistent with the policy that licensees must reband at the minimum reasonable cost. Moreover, we cannot fault the TA for assigning Liberty channels with less than Liberty's preferred 100 kHz separation. The TA provided channels that were available consistent with the Commission's rules, *i.e.*, the channels allocated to Liberty are “fully spaced” relative to other co-channel licensees.⁸⁷ Nothing more was required.

28. We therefore agree with the TA mediator and Sprint that Liberty has been afforded comparable facilities: It had a system susceptible to adjacent channel interference pre-rebanding and received a comparably interference-susceptible system post-reconfiguration.

C. FRA Disputes

1. Release of Liberty's Former Channels

29. *Liberty Position.* Relying on Section 2(a) of the FRA, Liberty argues that, although release of its pre-rebanding frequencies is a condition precedent to closing, it is not required to release its former channels “until on or before the Closing Date.”⁸⁸ Liberty avers that the FRA “preserve[s] [its] right, if comparable facilities cannot be obtained, to continue to operate on the Incumbent Frequencies.”⁸⁹ It argues that Sprint improperly relies on two inconsistent sections of the FRA to conclude, erroneously, that Liberty agreed to release the frequencies in October 2007.⁹⁰ Liberty acknowledges that Section 5 of the FRA requires it to clear the incumbent frequencies within an eight-month period following receipt of Sprint's decommissioning notice. It claims, however, that the Change Notice process and the interference

⁸⁵ *Id.* at 9.

⁸⁶ Liberty Communications, Inc. Sur-Reply to Nextel's Reply Proposed Resolution Memorandum at 12 (dated Dec. 15, 2008) (Liberty Sur-Reply) (“[p]rior to rebanding, Incumbent, like many other incumbent 800 MHz users suffered periodic interference from Nextel's ESMR operations”).

⁸⁷ See State of Maryland, *Memorandum Opinion and Order*, 21 FCC Rcd 11939, 11943 (PSHSB 2006). (“So long as a licensee's replacement channel has no co-channel stations within seventy miles, and so long as adjacent channel operations comply with the applicable rules limiting out of band emissions, the replacement channel is presumptively comparable to the licensee's original channel even if the original channel did not have the same configuration of co-channel and adjacent channel systems. The two channels are comparable because even if rebanding had not occurred, the licensee would have had to accept the presence of such operations under the rules had they been licensed on or adjacent to its original channel. [Citation omitted.] Comparable facilities does not entitle a licensee to the exact same interference environment that it had prior to rebanding, provided that the licensee's retuned system is protected by the same interference rules that applied prior to rebanding.”)

⁸⁸ Liberty PRM at 10. Section 9 of the FRA does not specify a date certain for the “Closing Date” but specifies nine events or conditions that must occur or be completed before the FRA is deemed “closed.”

⁸⁹ *Id.* at 10-11.

⁹⁰ Liberty Sur-Reply at 15-16.

issues supersede that schedule, and effectively render the frequencies “unclear,”⁹¹ and that it has not yet notified Sprint that its pre-rebanding frequencies have been cleared of users.⁹²

30. *Sprint Position.* Sprint asserts that Liberty has not completely cleared or vacated its pre-rebanding frequencies, which remain constructed and operational.⁹³ It contends that Section 5 of the FRA requires Liberty to clear all users from the pre-rebanding frequencies eight months after Liberty receives Sprint’s decommissioning notice for all replacement frequencies. Because it delivered that notice in February 2007, Sprint argues, Liberty was obligated to clear all users from the pre-rebanding frequencies in October 2007.⁹⁴ Sprint concedes that the FRA does not specifically address when Liberty’s pre-rebanding channels must be released to Sprint, but asserts that they must be cleared and released before the FRA can be deemed closed.⁹⁵ It asserts that, because Liberty did not adhere to the terms of the FRA, the Change Notice request does not supersede the FRA and does not excuse Liberty from vacating the pre-rebanding channels eight months after receipt of Sprint’s decommissioning notice.⁹⁶ Sprint also argues that Liberty’s Change Notice was not submitted until four months after the pre-rebanding frequencies should have been cleared.⁹⁷ Sprint notes that Liberty’s refusal to release the pre-rebanding frequencies is preventing a nearby public safety licensee from rebanding its system.⁹⁸

31. *Mediator Recommendation.* The mediator recommends the Commission find that Liberty should promptly release its pre-rebanding frequencies because it has received comparable facilities, and thus does not need to retain its pre-rebanding frequencies. The mediator concurs with Liberty that the FRA does not explicitly address when the pre-rebanding frequencies are to be released to Sprint.⁹⁹ Although the FRA is unclear on this issue, the Mediator notes, the most reasonable interpretation of Section 5 of the FRA is that Liberty must clear and timely release the pre-rebanding channels to Sprint, because the pre-rebanding frequencies must be made available for use by another licensee as part of its rebanding.¹⁰⁰

32. *Decision.* Notwithstanding the fact that the FRA may lack a specific timetable for Liberty to release its pre-rebanding channels, it is clear from the Commission’s rebanding orders that licensees must vacate their pre-rebanding channels once they begin operating on their replacement channels.¹⁰¹ That requirement overrides any interpretation of the FRA that Sprint or Liberty may choose to offer. Moreover, we have determined that Liberty received “comparable facilities” on its replacement frequencies. Accordingly, we direct Liberty to discontinue operating on its pre-rebanding frequencies within fifteen days of the release date of this *Memorandum Opinion and Order*.¹⁰²

⁹¹ Liberty Response at 4-5.

⁹² Liberty PRM at 11.

⁹³ Sprint Sur-Reply at 19.

⁹⁴ Sprint PRM at 21; Sprint Reply at 25.

⁹⁵ Sprint Sur-Reply at 19, n.67.

⁹⁶ *Id.* at 21. Section 8 of the Parties’ FRA reads in pertinent part that “changes must be performed expeditiously to keep the work on schedule....”

⁹⁷ *Id.*

⁹⁸ *Id.* at 21.

⁹⁹ TA RR at 23.

¹⁰⁰ *Id.*

¹⁰¹ 800 MHz Report and Order, 19 FCC Rcd at 15011 ¶ 65.

¹⁰² Liberty filed for and received a modification of license to operate on post-rebanding frequencies. The facilities specified in the modified license supersede those previously authorized, hence Liberty’s operation on its pre-rebanding frequencies is unauthorized.

2. Sprint's Obligation to Pay FRA Funds

33. *Liberty Position.* Liberty claims that Sprint owes an undisputed amount of approximately \$95,000 under the FRA and is obligated to begin reconciling actual costs and promptly pay for expenses that Liberty has incurred.¹⁰³ It asserts that the Commission “envisioned full payment of estimated costs upfront with a reconciliation at the end” and that “all rebanding payments should be reasonably contemporaneous with the time an expense is incurred.”¹⁰⁴ Liberty notes that the FRA requires the Parties to begin reconciling Actual Costs 45 days after Sprint receives Liberty’s cost documentation, and, thereafter, that Sprint must pay the balance “within 30 days after the Reconciliation Date.”¹⁰⁵ Liberty claims that it provided Sprint with documentation on September 8, 2008 and thus that payment is overdue.¹⁰⁶ It contends that Sprint only recently claimed that it was not obligated to pay these amounts because Liberty’s cost documentation lacked adequate detail. Liberty claims that it will supply Sprint with the missing detail, thus triggering the 45-day reconciliation period.¹⁰⁷ It maintains there is nothing in the Commission’s rules or the FRA that supports Sprint’s argument that the reconciliation process will not begin until Liberty releases its pre-rebanding frequencies.¹⁰⁸

34. *Sprint Position.* Sprint does not dispute that it owes Liberty approximately \$95,000. It argues, however, that the \$ 95,000 is not payable until Liberty releases its pre-rebanding frequencies and the Parties mutually agree to a reconciliation date.¹⁰⁹ It points out that the FRA provides that any outstanding balance of Actual Costs is not due until “thirty (30) days after the Reconciliation Date.”¹¹⁰ In contending that Liberty’s cost documentation is deficient and does not meet the TA’s standards,¹¹¹ Sprint alleges that: (a) the invoices submitted for work performed on a “per unit” or “per hour” basis fail to specify the dates or number of hours worked, (b) the invoices are inconsistent with the category of items contained in Schedule C of the FRA,¹¹² (c) the invoices lack the serial numbers of the portable and mobile units listed in Schedule C,¹¹³ (d) Liberty has not properly recorded the estimated travel mileage, and (e) Liberty has not provided receipts for shelter rent and electric utility expenses.¹¹⁴ Sprint claims that it had not earlier notified Liberty of the deficiencies because reconfiguration was incomplete and the reconciliation process had not yet begun.¹¹⁵

35. *Mediator Recommendation.* The mediator recommends the Commission find that Liberty is not entitled to begin the reconciliation process until it either (a) advises Sprint that reconfiguration is

¹⁰³ Liberty PRM at 8, Ex. 7. Exhibit No. 7 is Invoice No. 10111511 dated September 4, 2008 from Liberty to Sprint Nextel, which reads that the balance due is \$92,721.95.

¹⁰⁴ Liberty PRM at 9; Liberty Response at 2.

¹⁰⁵ Liberty PRM at 8. The FRA defines the “Reconciliation Date” as “the effective date upon which the Parties mutually agree on reconciliation.” Sprint PRM, App. A, FRA § 3(b)(i).

¹⁰⁶ Liberty Response at 2.

¹⁰⁷ Liberty Sur-Reply at 15.

¹⁰⁸ Liberty Response at 3.

¹⁰⁹ Sprint PRM at 16-17. Sprint states it may pay Liberty up to \$94,790.46, which includes a contingent amount that will likely vary before the parties close the FRA. *Id.*

¹¹⁰ Sprint PRM at 17.

¹¹¹ *Sprint* Reply at 22.

¹¹² *Id.* at 21-23.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Sprint Reply at 23.

complete and agrees to release its pre-rebanding frequencies; or (b) the Commission determines that Liberty has received comparable facilities and directs Liberty to release its pre-rebanding frequencies.¹¹⁶ The mediator agrees with Sprint that Liberty's cost documentation is incomplete, but notes Liberty has agreed to supply the missing information.¹¹⁷ Finally, the mediator determines that Sprint is not obliged to begin cost reconciliation because "Section 3(a) of the FRA contemplates a final reconciliation after reconfiguration is complete" and Liberty has stated that additional reconfiguration work is required.¹¹⁸

36. *Decision.* We agree with the mediator's interpretation of the FRA and find the language in Section 3(a) of the FRA is unambiguous: it explicitly provides that Sprint need not pay the remaining funds until 30 days after the Parties mutually set a reconciliation date. The record shows, and Liberty concedes, that reconfiguration is incomplete. Neither party has proposed a reconciliation date. We therefore conclude that the remaining funds due under the FRA are not payable by Sprint until reconfiguration is complete and Liberty has vacated its pre-rebanding channels and provided Sprint with complete and adequate cost documentation.

3. Additional Legal and Technical Consultant Costs

37. The Parties dispute whether Liberty should be reimbursed for additional costs for services that were not included in the FRA or the approved Change Notice. The Change Notice process, however, contemplates that parties will agree – in advance of work being performed – on the cost of addressing emergencies or unanticipated changes in expense, scope or schedule during implementation.¹¹⁹ The resulting agreement of the parties must be approved by the TA.¹²⁰ Section 8 of the Parties' FRA, the TA Handbook, the Commission's *800 MHz Report and Order* and the *Change Order Public Notice* explicitly instruct licensees to submit Change Notice requests concurrently to Sprint and the TA for review and written approval before the work is begun.¹²¹

38. *Liberty Position.* In addition to the agreed-upon costs specified in the FRA and the approved Change Notice, Liberty seeks: (a) \$132,948.88 for legal services rendered by Latham, (b) \$100,840 for Schwaninger's legal fees,¹²² (c) \$42,930 for additional National Wireless consultant fees;¹²³ (d) \$1,200 for ATG's engineering services,¹²⁴ and (e) \$4,000 for Liberty's management of the Bird investigation.¹²⁵

¹¹⁶ TA RR at 18, 24.

¹¹⁷ *Id.* at 24.

¹¹⁸ *Id.*

¹¹⁹ See FCC Announces Supplemental Procedures and Provides Guidance for Completion of 800 MHz Rebanding, WT Docket No. 02-55, *Public Notice*, 22 FCC Rcd 17227 (2007) (*Change Order Public Notice*).

¹²⁰ *Id.*

¹²¹ Section 8(a) of the Parties' FRA reads in pertinent part that "[i]f any Party believes that any change(s) to the work contemplated by this Agreement is required, ... such Party shall promptly notify the other Parties in writing...." Sprint PRM at App. A. Section 8(b) further reads, in pertinent part, that "the receiving Party shall immediately perform its own analysis of the need for change in the work....and submit to the Transition Administrator a copy of the proposed amendment [and] a written request for its approval." *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Liberty anticipates the costs will continue to rise until the interference issue is resolved. Liberty Supplement to PRM at 13. Liberty states the increased costs result from further negotiation and mediation activities, and preparation of four rounds of PRMs. *Id.*

39. In defense of its incurring costs not provided for in the FRA or approved Change Notice, Liberty argues that the Commission's orders require Sprint to pay all rebanding costs necessary to provide Liberty with comparable facilities.¹²⁶ It contends that "whether costs are judged reasonable must be viewed in light of the overall goals of rebanding."¹²⁷ It argues that the costs not included in the FRA or the approved Change Notice were the minimum necessary to investigate and identify the interference source, and to prepare and file the January 23, 2008 Change Notice, given Sprint's unwillingness to assist in resolving interference to Liberty's operations.¹²⁸ It insists the services of National Wireless, Latham, and Schwaninger were complementary rather than duplicative because each firm had a distinct role.¹²⁹ For example, Liberty claims that National Wireless investigated the interference and consulted on the Change Notice,¹³⁰ and that Latham was retained to draft the Change Notice and worked with National Wireless because the two firms had worked together on other rebanding projects.¹³¹ Schwaninger was retained to address general reconfiguration matters and to serve as liaison with Sprint and the mediator.¹³² Liberty submits that it was unnecessary to obtain Sprint's approval before incurring the additional expenses because Sprint's prior approval is not a condition of "reasonableness" or a prerequisite to Sprint's overall obligation to bear all rebanding costs.¹³³ Although, as noted *supra*, Liberty claims that Sprint was unwilling to assist in interference resolution, it inconsistently also maintains that Sprint actively participated in efforts to resolve the interference, and, therefore, should have anticipated the additional costs incurred by Liberty.¹³⁴

40. *Sprint Position.* Sprint counteroffers \$47,800 for some of the additional services performed for Liberty, *i.e.*, (a) \$34,225 for the Bird report, (b) \$4,000 for Liberty's internal costs to assist Bird with the study; (c) \$5,600 for Schwaninger to negotiate the Bird SOW,¹³⁵ and (d) \$3,975 for National Wireless' technical services.¹³⁶ Sprint contends that the requested additional \$100,840 for Schwaninger's legal fees and the additional \$42,930 for National Wireless' technical costs "were not accounted for in the FRA, detailed in the Change Notice or discussed with [Sprint] until after they were incurred."¹³⁷ Sprint also argues that it was unnecessary to retain two law firms to provide the additional legal services. It contends that Latham's \$132,948.88 fee should be disallowed because Latham "is neither an approved vendor in Schedule C of the FRA nor identified in the Change Notice."¹³⁸ Sprint states it was unaware of Latham's involvement in the rebanding effort until it received an invoice in July 2008.¹³⁹

¹²⁶ Liberty PRM at 11-12, 20, Ex. 8; Liberty Response at 6.

¹²⁷ Liberty Response at 7.

¹²⁸ Liberty PRM at 12.

¹²⁹ *Id.* at 12-13.

¹³⁰ *Id.* at 13.

¹³¹ *Id.*

¹³² *Id.* at 14.

¹³³ Liberty Response at 7-8.

¹³⁴ Liberty Sur-Reply at 18.

¹³⁵ Sprint agrees to pay 16 hours at \$350 per hour for Schwaninger's legal fees. Sprint Supplement PRM at App. H.

¹³⁶ Sprint PRM at 17. Sprint agrees to pay 15 hours at \$265 per hour for National Wireless' technical services. Sprint Supplement PRM at App. H.

¹³⁷ Sprint SOP at 4; Sprint Reply at 18.

¹³⁸ Sprint Reply at 19.

¹³⁹ *Id.* at 20.

41. *Mediator Recommendation.* The mediator calculates the total cost in dispute as \$277,918.88, which is approximately 40% of the \$650,135.35 that Liberty estimated as the total cost of rebanding its system.¹⁴⁰ Employing a two-step analysis, the mediator notes that costs determined to be “at risk,” *i.e.*, those incurred without Sprint or TA approval, may be reimbursable if they satisfy the Minimum Cost standard. The mediator finds that Liberty did not comply with Section 8 of the FRA and therefore, assumed the risk that it would not be reimbursed for its additional costs.¹⁴¹ The mediator also finds that Liberty failed to submit documentation demonstrating that the additional legal and technical costs were the “minimum necessary” to accomplish rebanding in a reasonable and prudent manner.¹⁴² The mediator concludes that Liberty’s alleged fear that the Change Notice would not be approved because Liberty lacked sufficient supporting information was not a legitimate excuse for Liberty’s failure to notify Sprint before incurring the additional costs as required by Section 8 of the FRA, and to seek TA review and approval.¹⁴³ The mediator concludes that Liberty “presented Sprint with a *fait accompli* when it employed a ‘self-help’ approach to investigate the interference” contrary to the TA’s policies.¹⁴⁴ Nonetheless, the mediator recommends that Sprint pay the following costs: (a) up to \$5,600 for Schwaninger’s legal fees; (b) \$3,975 for National Wireless’ consulting services; and (c) up to \$1,200 for ATG’s technical services, all conditioned on the submission of additional documentation.¹⁴⁵

42. *Decision.* On the record before us, and as discussed, *infra*, we disallow most of Liberty’s claimed additional costs for services that were not provided for in the FRA or the approved Change Notice.

43. Schwaninger Additional Legal Fees. Liberty failed to comply with Section 8 of the FRA, and did not seek TA approval of the additional costs it incurred, thus placing all of its additional, unapproved, costs at risk. We concur with the mediator, however, that costs determined to be “at risk” may be reimbursable if the Minimum Cost standard is met.¹⁴⁶ We deny, in part, Liberty’s request that Sprint pay for Schwaninger’s additional legal fees because the record does not reflect that Liberty met its burden of showing that the additional costs were the minimum necessary.

44. Latham Legal Fees. Liberty acknowledges it unilaterally deviated from the Change Notice process when, based on National Wireless’ recommendation, it hired Latham in November 2007 to perform work not included in the FRA or delineated in the January 2008 Change Notice.¹⁴⁷ We reject, as does the mediator, Liberty’s speculative argument that it deviated from Section 8 of the FRA out of “fear” that Sprint would reject a Change Notice “out of hand” without sufficient support.¹⁴⁸ By its own admission, Liberty “took responsibility for investigating the interference”¹⁴⁹ and incurred unapproved expenses in violation of its contractual obligations under the FRA. In so doing, it deprived Sprint of the opportunity to review what Liberty proposed, to propose alternatives, and to negotiate the associated costs.

¹⁴⁰ TA RR at 25, citing Sprint PRM, App. A at 77.

¹⁴¹ *Id.* at 25.

¹⁴² *Id.* at 26.

¹⁴³ *Id.* at 25.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 27.

¹⁴⁶ *Id.* at 25.

¹⁴⁷ Liberty Sur-Reply at 17. We note that Latham is not an approved vendor in the Parties’ FRA, as amended.

¹⁴⁸ Liberty PRM at 19-20; Liberty Sur-Reply at 17.

¹⁴⁹ Liberty Sur-Reply at 17.

45. We find that the costs that Liberty incurred for the additional services provided by Latham were not the “minimum necessary” to achieve comparable facilities.¹⁵⁰ We can appreciate Liberty’s desire to take advantage of a working relationship between Latham and National Wireless. Liberty, however, does not explain why Schwaninger, its telecommunications counsel – well versed in rebanding matters and familiar with the case – was not competent to provide the services assigned to Latham, *i.e.*, evaluation of National Wireless’ findings. Moreover, contrary to Liberty’s assertion, the services provided by Latham duplicated those provided by Schwaninger. Thus, for example, the February 2008 invoices from both firms show that each participated in selecting an independent engineering firm to investigate interference and, thereafter, negotiated the Statement of Work (SOW).¹⁵¹ Liberty has not established that the retention of two law firms to work on the same matter reflected the “minimum necessary” cost of rebanding its system, and we disallow all of Latham’s fees.

46. We find that Sprint should pay \$16,920 for expenses Liberty incurred for Schwaninger to interview engineering firms to investigate the interference claims and to participate in the drafting and negotiation of the SOW.¹⁵² Sprint offers \$5,600 for Schwaninger’s fees to negotiate the SOW, but fails to explain how it determined that \$5,600 is a reasonable fee for advising Liberty over the five month period during which the parties drafted, reviewed and executed the SOW.¹⁵³ Because it was Sprint that proposed that Liberty engage an independent engineering consultant to investigate the interference claims, and because Sprint participated in drafting the related SOW over a five month period, we find it reasonable for Sprint to pay the associated legal fees.¹⁵⁴

47. National Wireless Technical Consultant Costs. Sprint states it does not dispute the \$23,055 for National Wireless’ consulting services approved in the amended FRA Schedule C, but disputes the additional costs requested thereafter, which total \$42,930.¹⁵⁵ As a counteroffer, Sprint offers to pay a total of \$3,975 (a rate of 15 hours at \$265 per hour) for National Wireless’ expenses to identify and interview third-party engineering services candidates.

48. The January 23, 2008 Change Notice does not contemplate the additional work that Liberty authorized National Wireless to perform in connection with the interference investigation.¹⁵⁶ In authorizing the additional work, without an approved Change Notice, Liberty argues it was required “to turn to its own resources” because Sprint was uncooperative.¹⁵⁷ We see no evidence of this in the record.

¹⁵⁰ TA RR at 26. (Latham is not an approved vendor in the FRA Schedule C, and its services are not identified in the Change Notice.)

¹⁵¹ Liberty SOP at Attachment.

¹⁵² We note that Sprint has incorrectly calculated National Wireless’ additional expense as \$4,440. *See* Sprint Reply at 19, n.65, whereas the correct amount, as reflected in Appendix H in Sprint’s Supplemental PRM is \$3,975. *See* Sprint Supplement PRM, at App. H. Based on our review of Schwaninger’s invoices submitted in the record, we determine that Sprint should pay for 42.3 hours at \$400 per hour, which equals \$16,920.00. *See* Liberty PRM at Ex. 11. (Liberty requests \$42,005 for Schwaninger’ legal fees incurred June 2007 through June 2008 and \$58,835.00 for the period July through December 2008, for a total of \$100,840. *See* Liberty PRM at Ex. 11; Liberty Supplement PRM at 13-14.)

¹⁵³ Sprint PRM at 17; Sprint Reply at 17. Sprint agrees to pay Schwaninger’s legal fee of 16 hours at \$350 per hour to negotiate the Bird SOW, and related interaction with its client and associated parties. *See* Sprint Sur-Reply at App. D.

¹⁵⁴ Sprint PRM at 3.

¹⁵⁵ Liberty PRM at Ex. 8; Sprint Sur-Reply at 14. We note that Liberty does not support its request for National Wireless’ “future work” estimated to cost \$5,300. Liberty PRM at Ex. 8; Liberty Supplement PRM at 14.

¹⁵⁶ Liberty PRM, Ex. 1.

¹⁵⁷ *Id.* at 19.

49. Because of the lack of detail in National Wireless' invoices, we are unable to determine whether the majority of the services performed satisfy the minimum cost standard. We do, however, approve as reasonably related to the initiation of the interference study approved by Sprint, the sum of \$3,975 which National Wireless expended to obtain third-party engineering services.

50. ATG Technical Consultant Costs. ATG provided a declaration from ATG engineer, Mehran Nazari, to support its filings in this proceeding.¹⁵⁸ Therefore, the mediator recommends that Sprint pay ATG's costs not to exceed \$1,200, conditioned upon Liberty's submission of additional documentation that ATG's work satisfies the minimum cost standard.

51. We agree with the mediator that the ATG costs appear to be necessary to support Liberty's filings. We conclude that given the relatively small amount at issue, and because ATG's work, on its face, reflects at least \$1,200 of effort, that Sprint should pay ATG's fee.

IV. CONCLUSION

52. Our decision herein rests on the following three principles: (a) The Commission's comparable facilities standard contemplates that relocating licensees, post-rebanding, will receive systems protected against interference to the extent that the Commission's rules allow – licensees are not protected against adjacent channel interference; (b) long-standing Commission policy establishes that licensees are responsible for the accuracy of information provided to the Commission and reflected on their instruments of authorization; and (c) the Commission's *Change Order Public Notice* clearly requires that extra-FRA expenses may be incurred only when authorized.

53. Here, Liberty's concern over potential adjacent channel interference to its system in the "near-far" context¹⁵⁹ may well be valid, but the potential for adjacent channel interference, post-rebanding is no greater than that which existed pre-rebanding. In the pre-rebanding circumstance, Liberty was vulnerable to interference from the mobiles of any other licensee operating on an adjacent channel, and could not be heard to complain because the Commission's rules do not protect licensees against adjacent channel interference. So too with Liberty's post-rebanding frequencies.

54. The Commission must rely on its licensees for the accuracy of the information supplied in license applications and reflected in station licenses. Liberty was on notice of the need to validate what Liberty itself contends was an obvious error on its license for station WPLS383.¹⁶⁰ Its negligent failure to do so resulted in it operating at variance from its licensed parameters for a period of years and, ultimately, to the potential for co-channel interference between Stations WPLS383 and KNIQ708. The responsibility for correcting that error and accepting its consequences rests with Liberty alone.

55. The Commission's guidance on Change Notices is clear – a licensee must present a proposed change to Sprint and the TA before incurring expenses in excess of those allowed in an FRA. As the mediator explains, licensees may not incur expenses and then present an invoice to Sprint as a *fait accompli*. Liberty's failure to adhere to the *Change Order Public Notice* is particularly egregious, e.g., Sprint was unaware that the Latham firm had been retained until it was presented with Liberty's invoice for \$ 132,948.88. When the issue of interference first arose, the Change Notice policy was followed and Sprint agreed to pay for the Bird Study. Accordingly, we have approved some of the expenses reasonably related to that study. Other subsequent expenses, however, do not conform to the advance approval policy set out in the *Change Order Public Notice* and do not reflect costs that are "the minimum necessary to provide facilities comparable to those presently in use." Those expenses have been disallowed.

¹⁵⁸ TA RR at 27.

¹⁵⁹ *Supra* ¶ 23.

¹⁶⁰ *Supra* n.68.

56. In sum, we allow Liberty to recover the aggregate amount of \$ 60,320 from Sprint, representing Liberty's minimum necessary rebanding expenses. We also direct Liberty to discontinue operating on its pre-rebanding channels within 15 days of the release date of this *Memorandum Opinion and Order*. We direct the TA to cooperate with Liberty in the identification of a new frequency for either station WPLS383 or KNIQ708, should Liberty make such a request, and should a substitute channel be available, with the understanding that Liberty is responsible for any expense associated with relocating to the new channel.

ORDERING CLAUSES

57. Accordingly, pursuant to the authority of Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392; Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 90.677, of the Commission's Rules, 47 C.F.R. § 90.677, IT IS ORDERED that the issues submitted by the Transition Administrator are resolved as discussed above.

58. IT IS FURTHER ORDERED that, effective fifteen (15) days from the release date hereof, Liberty Communications, Inc. SHALL DISCONTINUE operations on its pre-rebanding frequencies.

FEDERAL COMMUNICATIONS COMMISSION

Michael J. Wilhelm, Deputy Chief
Policy Division
Public Safety and Homeland Security Bureau